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January 11, 2001

The Honorable Vernon Williams
Secretary
Surface Transportation Board
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No.1)
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1)
Major Rail Consolidations

Dear Secretary Williams:

Enclosed for filing in the above captioned docket are the original and twenty-five copies of the Rebuttal Comments of Metra, as well as two additional copies for date-stamp.

Also enclosed with this letter is a diskette with the text of the Rebuttal Comments in WordPerfect 5.X format.

Sincerely,

Jamie P. Rennert

Encl.

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BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL COMMENTS OF METRA

The Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a "Metra", through its undersigned counsel, hereby submits the following rebuttal comments in this proceeding. Certain commenters have mischaracterized the proposals of Metra and other commuter rail parties, and Metra wishes to clarify its positions in response. Metra urges the Board not to be misled by those who would have it believe that the future of freight service is doomed because of the resurgence of interest in and demand for commuter rail service.

Metra's overall goal with respect to the implementation of a major rail merger is the preservation of the level and quality of its service in effect under contract at the time that the proposed merger is announced. In an effort to advance this goal, Metra offers its comments on the following four issues: the essential services test, pre-filing consultation, reopening or override of contracts, and requiring the funding of infrastructure improvements.

1. Essential Services

Metra continues to advocate that the Board explicitly state that it will consider commuter and passenger rail services to be essential services[1], in contrast with UP's and NS's arguments to the contrary.[2] Because of the significant public expenditure involved in operating and maintaining commuter and passenger rail systems, the Board should establish a presumption that they meet the test for essential services – sufficient public need for the service and the unavailability of adequate alternative transportation.[3] Moreover, if, as UP claims,[4] future mergers will not likely pose a threat to passenger rail service because such mergers will be end-to-end, then freight carriers should not fear a rule that declares commuter and passenger rail to be essential services. Merger applicants therefore should have an extraordinary burden to demonstrate that their proposed merger should be permitted to disrupt or reduce the reliability of commuter and passenger rail services.

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[1] In addition, commuter and passenger rail service that has been approved and funded, even if not actually implemented, at the time of filing of a merger application, should also be considered an essential service. The operators of these systems as well as commuters themselves will have taken actions in reliance on the planned service (such as acquisition of equipment and purchase of residences near commuter rail stations). Such service should not be frustrated by a merger application merely because it is close to implementation, but not actually implemented yet.

[2] *See* Union Pacific's Reply Comments on Proposed Merger Rules (UP Reply) at 30-32; Reply Comments of Norfolk Southern in Response to Notice of Proposed Rulemaking (NS Reply) at 50-51.

[3] Courts have upheld the ICC's and now Board's application of the essential services test for determining when protective conditions may be imposed. *See, e.g., Lamoille Valley R.R. v. I.C.C.*, 711 F.2d 295, 305, 309-10 (D.C. Cir. 1983).

[4] UP Reply at 32.

2. Pre-filing Consultation

Metra is pleased to see that several Class I carriers generally agree that proposed pre-filing consultations with commuter authorities would be advantageous.[5] Such consultations are necessary so that applicants can comply with the proposed requirements to submit full-system operating plans and service assurance plans (proposed §§ 1180.8(a) and 1180.10). Discussions with commuter authorities need not delay the timing of filing of applicants' merger application (as BNSF fears)[6], but can be undertaken during the period between the pre-filing notification required under § 1180.4(b) and the filing of the application itself.

NS objects to the proposed requirement that applicants include passenger operations in their preliminary analyses of a proposed merger[7], yet NS is wrong to distinguish impacts on passenger operations from those that it presumably believes are appropriate to measure at the outset. Commuter operators are customers, tenants, and landlords of freight carriers and are as affected by merger implementation as are shippers, other railroads, network links such as ports, and communities. Analyses of impacts on all of these entities are appropriate at the time of application filing.

Furthermore, while Metra takes no position with respect to Amtrak's claim that applicants should not be required to describe the impact of their proposed transaction on passenger rail services where they operate over certain Amtrak lines[8], Metra supports New Jersey Transit's request for such a required description with respect to

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[5] *See* Reply Comments of the Burlington Northern and Santa Fe Railway Company (BNSF Reply) at 12, 37; UP Reply at 28-29; NS Reply at 36-37, 50.

[6] BNSF Reply at 13.

[7] NS Reply at 51; *see* proposed § 1180.7(b).

[8] Amtrak's Reply Comments in Response to Notice of Proposed Rulemaking (Amtrak Reply) at 5-6.

lines owned by the commuter authorities themselves.[9] Indeed, Metra owns several lines radiating from Chicago on which multiple carriers operate. If merger applicants were not required by proposed § 1180.10(b) to forecast how they will operate on these lines in coordination with freight and passenger operators, their application would be deficient and could present an inaccurate picture of anticipated post-merger operations.

3. Opening or Override of Contracts

Metra opposes UP's and NS's proposals to prohibit the Board from opening and overriding contracts between freight railroads and commuter operators.[10] Such a condition is an important element of the toolbox of remedies with which the Board approaches proposed mergers.

While some commuter authorities might have had the foresight to negotiate provisions addressing mergers in their trackage rights/use agreements or PSAs, others might not have done so. The Board should consider reopening or overriding contracts on a case-by-case basis, because there are circumstances in which it is appropriate to open up or override provisions of these agreements, while in other situations it is not appropriate. If parties did address potential merger impacts in their contract, then that contract provision should govern their relationship, unless the commuter operator satisfies a heavy burden of demonstrating why the contract provision should not control. If the parties did not address potential merger impacts, then it might be appropriate for the Board to open up that contract, to ensure that the commuter service is not displaced or otherwise harmed.

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[9] *See* proposed § 1180.10(b); Comments of New Jersey Transit Corporation on Notice of Proposed Rulemaking at 9.

[10] UP Reply at 29-30; NS Reply at 49-51.

Commuter operators negotiate for a particular level of service (as UP notes[11]) within a particular operating context. When that context changes, as it does in the case of a proposed merger, the operators may no longer be receiving the benefit of their bargain. In fact, it is because contracts are intended to provide commuter operators with a particular quality and level of service that the Board should be able to step in by way of its conditioning power to ensure that merger implementation does not eviscerate that standard of service. If a freight carrier had negotiated to provide a certain level of service and its merger required revision to its service contract to achieve the benefits of the transaction, that carrier would not hesitate to seek a contract override from the Board. The Board should be able to use its preemption power not only to ensure competition and realization of merger benefits, but also to preserve pre-merger levels and quality of commuter service. Just as the Board has approached the reopening of shipper and other contracts on a case-by-case basis in previous mergers, so should it reserve to itself the option of imposing this remedy as a merger condition if necessary.

4. Conditioning Merger Approval on Funding of Infrastructure Improvements

There are circumstances in which it is appropriate for the Board to order the merger applicants to fund capital improvements as a condition to merger approval. Some carriers disagree and do not believe that such circumstances exist.[12] Regardless of whether the improvements are specifically aimed at alleviating impacts on commuter and passenger operators, or whether they are intended primarily to benefit

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[11] UP Reply at 30.

[12] *See* UP Reply at 28; NS Reply at 50-51; Reply Comments of the Association of American Railroads (AAR Reply) at 18.

freight railroads with corollary benefits to commuter operators, the funding of capital improvements is another potent remedy against merger-related harm. The Board should not allow contractual commitments regarding funding responsibilities to preclude it from imposing this condition where appropriate, despite AAR's and NS's arguments to the contrary.[13]

5. Miscellaneous

Finally, Metra offers its comments on two miscellaneous issues. First, Metra disagrees with UP's argument that the Board should not be permitted to provide monetary remedies in the event that passenger service problems arise as a result of merger implementation.[14] While other remedies such as service orders might resolve a problem, the Board should have the option to impose a remedy that it believes will be most appropriate and effective under the circumstances, including a monetary penalty. For instance, where carriers have had a record of persistent violations of contractual performance undertakings to commuter authorities, a monetary penalty might be appropriate. A categorical prohibition of this remedy is not necessary where the Board is empowered to craft creative solutions to merger-related problems using a range of remedies.

Second, Metra agrees that the Board should continue to exercise its existing authority to impose new or revised conditions on consummated mergers[15] where those mergers have not produced anticipated benefits, or where previously imposed

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[13] AAR Reply at 18; NS Reply at 50-51.

[14] UP Reply at 33-34.

[15] *See, e.g.*, Reply Comments of the State of Maryland Department of Transportation at 4-5; *see also* Amtrak Reply at 7-8, describing the Board's willingness to alter its NECR trackage rights condition in the Conrail acquisition proceeding if it does not work as intended to preserve Amtrak's Vermonter service.

conditions have failed to alleviate harm. If it becomes clear -- during an oversight proceeding or another proceeding seeking to reopen a merger – that unexpected obstacles or changed circumstances have arisen that make the impacts of the merger more harmful than anticipated, the Board should be able to intervene and correct the situation. Such action need not be any more intrusive or burdensome than was the condition originally imposed, but will restore equity to a situation that has become unbalanced in favor of the merged carrier.

Conclusion

Metra supports proposals that have been offered to ensure that existing pre-merger levels and quality of commuter and passenger service are maintained in the event of a future major rail merger. Metra appreciates the opportunity to participate in this proceeding and the Board's consideration of its views.

Respectfully submitted,

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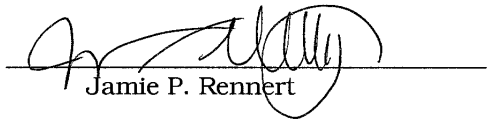
Dated: January 11, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this day of January 11, 2001, I caused to be served a copy of the foregoing Rebuttal Comments of Metra upon all parties of record in this proceeding, by first class mail, postage prepaid.



Jamie P. Rennert

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